Supreme Court, U. S.
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No. 76-1607

In the Supreme Court of the United States

OCTOBER TERM, 1977

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

SAMUEL H. SLOAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

HARVEY L. PITT,
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Securities and Exchange Commission,
Washington, D.C. 20549.

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Respondent contends (Br. 30-31) that the judgment of the court of appeals in this case has the effect of permanently enjoining the Securities and Exchange Commission from issuing consecutive 10-day suspension orders under Section 12(k) of the Securities Exchange Act of 1934, as added, Pub. L. 94-29, 89 Stat. 118, 15 U.S.C. (Supp. V) 78*l*(k), with respect to the securities of any issuer. The Commission agrees that unless the judgment is vacated, modified, or reversed by this Court, the Commission will be required to abandon an interpretation and application of the statute that it has consistently followed for more than 30 years.

This case arose on petition for review of a series of 10-day suspension orders issued by the Commission (Pet. App. B, p. 8a). On petition for review of an order of the Commission, the reviewing court's jurisdiction is limited

to the power "to affirm or modify and enforce or to set aside the order * * *." Section 25(a)(3) of the Act, 48 Stat. 902, as amended, 15 U.S.C. (Supp. V) 78y(a)(3). The court of appeals, however, did not limit its relief to the orders before it. Instead, the court in its opinion "directed [the Commission] to discontinue forthwith its adoption and use of successive ten-day suspension orders to order the suspension of trading in a security for an extended period, i.e., in excess of ten days" and concluded "[i]t is so ordered" (Pet. App. B, p. 17a). The court's judgment granted the petition for review "in accordance with the opinion of this court" (Pet. App. A, p. 2a).

Accordingly, although there can be no doubt that the court of appeals lacked jurisdiction to enjoin the Commission from issuing consecutive 10-day suspension orders in the future, it is equally plain that the court intended its judgment to have injunctive effect.[1] The Commission has determined that it must abide by that judgment unless this Court grants relief.[2]

Thus the decision below, unless reviewed, will preclude the Commission ever again from exercising an important tool for protecting investors against suspected fraud. As is indicated in the petition (Pet. 9), the Commission's power to issue consecutive 10-day suspension orders has been

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[1]The judgment could not have been intended merely to set aside particular suspension orders, for the series of such orders that respondent challenged had terminated even before oral argument was heard (see Pet. 11).

[2]If the court of appeals' judgment were modified only to eliminate its injunctive effect, however, the court's decision still would stand as a practical barrier to the issuance of consecutive 10-day suspension orders. In almost any corporation whose shares are publicly traded there will be shareholders residing in the Second Circuit who would be able to petition that court for review of a suspension order.

exercised with respect to an average of 20 securities each year for the past 12 years, thus protecting from market manipulation investors who otherwise might have traded in those securities. Such protection is lost for the future under the decision of the court of appeals.

For the reasons stated here and in the petition, this Court should grant the Commission's petition for a writ of certiorari.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

HARVEY L. PITT,
General Counsel,
Securities and Exchange Commission.

OCTOBER 1977.

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